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Supreme Court, U.S.
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No. 98-1547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARILYN PONA,
Petitioner,

v.

CECIL WHITTAKER'S INC., et al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS ANNE-MARIE CLARKE, ROBERT HAAR, MATTHEW PADBERG, CHARLES MISCHEAUX, FREEMAN BOSLEY, JR., INDIVIDUALLY AND IN THEIR CAPACITIES AS COMPOSING THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF ST. LOUIS, AND MATTHEW RODDEN, MICHAEL CALCATERRA AND JOSEPH ROBINSON'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Marilyn Pona is the appellant and is represented by Jerome J. Dobson, Attorney at Law, in this proceeding.

Cecil Whittaker's, Inc. is a respondent and is represented by Louis Gilden, Attorney at Law, in this proceeding.

C.W. Central Westend, Inc.; Eye's Enterprises, Inc.; Paul Lia, as Trustee of Eye's Enterprises, Inc.; Paul Lia, In His Individual Capacity; Ralph Lia, as Trustee of Eye's Enterprises, Inc., Ralph Lia, In His Individual Capacity; Jim Craddock, In His Individual Capacity, to this respondent's knowledge, are not parties to this proceeding.

The St. Louis Board of Police Commissioners, as well as Anne-Marie Clarke, Matthew J. Padberg, Robert Haar, Charles Mischeaux, and Freeman Bosley, Jr., members of the Board of Police Commissioners at all times pertinent hereto are respondents in this matter and are represented by Judith A. Ronzio, Attorney at Law. They are hereinafter collectively referred to as "Respondent Board".

Michael Calcaterra, Matthew Rodden, and Joseph W. Robinson, in their individual capacities and as police officers for the City of St. Louis were granted summary judgment in the district court, and that Order was affirmed by the United States Court of Appeals for the Eighth Circuit. Petitioner does not specify whether or not these individuals are Respondents herein and none of Petitioner's "Questions Presented" appear to be directed to the lower courts' rulings with respect to these individuals. Nevertheless, if, in fact, they are held to be Respondents herein, they are represented by Judith A. Ronzio, Attorney at Law.

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A. On its face it has no applicability to enforcement of sections 213.065, 209.150 or 209.160, R.S.Mo. and

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JURISDICTION

Petitioner filed an application for an extension of time to file a petition for Writ of Certiorari. The petition was presented to Justice Thomas, who on February 17, 1999 extended the time to and including March 23, 1999. (Application No. A-673)

STATUTES

42 U.S.C. 12132 Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

MO.Rev.Stat.
Section 209.150

209.150 Rights of persons with visual, hearing or physical disabilities- guide, hearing or services dogs, no extra charge for – liability for actual damages.

1. Every person with a visual, aural or physical disability shall have the same rights afforded to a person with no such disability to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and other public places.

2. Every person with a visual, aural or physical disability is entitled to full and equal accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, taxis, streetcars, boats or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.

3. Every person with a visual, aural or physical disability shall have the right to be accompanied by a guide dog, hearing dog, or service dog, which is especially trained for the purpose, in any of the places listed in subsection 2 of this section without being required to pay an extra charge for the guide dog, hearing dog or service dog; provided that such person shall be liable for any damage done to the premises or facilities by such dog.

4. As used in sections 209.150 to 209.190, the term **"service dog"** means any dog specifically trained to assist a person with a physical disability by performing necessary physical tasks which the person cannot perform. Such tasks shall include, but not be limited to, pulling a wheelchair, retrieving items, and carrying supplies.

MO.Rev.Stat.
Section 209.160

209.160 Discrimination or interference with persons having visual, hearing or physical disabilities, a misdemeanor.

Any person or persons, firm or corporation, or the agent of any person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities enumerated in section 209.150 or otherwise interferes with the rights of a totally or partially blind or deaf person, or a physically disabled person under section 209.150 shall be guilty of a class B misdemeanor.

MO.Rev.Stat.
Section 231.065

213.065 Discrimination in public accommodations prohibited, exceptions.

1. All persons within the jurisdiction of the state of Missouri are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation, as hereinafter defined, without discrimination or segregation on the grounds of race, color, religion, national origin, sex, ancestry, or disability.

ORDINANCE

Ordinance
Section 3.44.110

3.44.110 Discrimination in public accommodations.

It shall be a prohibited discriminatory public accommodation practice for any person, including without limitation, any

owner, lessee, manager, proprietor, custodian, agent or employee of a place of public accommodation, to discriminate against any individual because of race, color, religion, sexual orientation, familial status, legal source of income, disability, national origin or ancestry, with respect to the terms, conditions and privileges of access to or with respect to the uses, services and enjoyment of a place of public accommodation.

REASONS FOR DENIAL OF THE WRIT

I

FAILURE TO COMPLY PROMPTLY WITH RULE 12.3 AND RULE 14

Respondent Board of Police Commissioners ("Respondent Board") adopts and incorporates herein by reference Point I of the Brief in Opposition to Certiorari submitted herein by Respondent Cecil Whittaker's, Inc. Counsel for Respondent Board also failed to receive Petitioner's notice of filing petition for writ of certiorari until April 9, 1999, despite the fact that the actual filing occurred on March 23, 1999, and the due date for filing a brief in opposition is April 25, 1999.

Respondent Board further adopts and incorporates herein by reference in its entirety Point II of the Brief in Opposition to Certiorari submitted herein by Respondent Cecil Whittaker's, Inc. In Paragraph 5 of the aforesaid Point I, Respondent Cecil Whittaker's, Inc. notes that Petitioner has, *inter alia*, failed to identify and isolate the issues as to each defendant affected by the litigation, in violation of Rule 14. In this regard, although Petitioner fails to specify which of her arguments are directed against Respondent Board, it appears that only Points I and III of her Petition for Certiorari are so directed. Moreover, it does not appear that Petitioner is seeking certiorari with respect to the entry of summary judgment in favor of Police Officers Matthew Rodden and Michael Calcaterra and Lieutenant Joseph Robinson (hereinafter collectively referred to as "the individual police defendants"). Respondent Board will proceed on the foregoing assumptions.

II

THE "SPECIAL ORDER" AT ISSUE HERE IS NOT IN VIOLATION OF THE ADA(42 U.S.C. 12132) BECAUSE: A. ON ITS FACE, IT HAS NO APPLICABILITY TO ENFORCEMENT OF SECTIONS 213.065, 209.150 OR 209.160, RS.Mo. AND B. THE SPECIAL ORDER WAS NOT A POLICY OF RESPONDENT BOARD, BUT, RATHER, WAS A PROCEDURAL DIRECTIVE INSTITUTED AND AUTHORIZED BY THE CHIEF OF POLICE.

Special Order 86-S-31, the directive at issue here, is reproduced in full in the appendix to this Brief. For the record, this is presumably the same Special Order incorrectly referenced by Petitioner as "86-5-31" throughout her Petition for Writ of Certiorari.

Petitioner, in Point I of her Petition, mischaracterizes both the content of Special Order 86-S-31 and the opinion below of The Honorable Morris Arnold. Petitioner additionally neglects to reference pertinent facts and documents, submitted to the court below by Respondent Board in its Brief and Appendix, which render this issue considerably more factual and less theoretical than Petitioner is prepared to admit.

It is certainly true, as Petitioner states, that Judge Morris Arnold stated that Special Order 86-S-31 is not a "policy" of Respondent Board because it was promulgated and authorized by the Chief of Police, and not by the Board, itself. Petitioner, however, has failed to provide the Court with copies of Police Manual Rule 1, Sections 1.030, 1.031 and 1.503 (see Appendix), which set out the distinction between "policy", which is established by Respondent Board and recorded in the Police Manual, and procedural directives pertaining to the day-to-day operation of the Department. It is these procedural directives which are

designated as "Special Orders" of the Department and which may be promulgated and authorized by the Chief of Police, without the express approval of Respondent Board.

Thus, Judge Morris Arnold's position in this regard was grounded in fact, and was not the theoretical or philosophical flight of fancy Petitioner posits. The judge also astutely observed that Petitioner "failed to advance" below, the argument she now places primary reliance on, to-wit; that the chief is in some respects the Board's delegated policy-maker. *Pona v. Cecil Whittaker's, Inc., et al.* 155 F.3d 1034 (C.A.8, 1998) at 1037.

More importantly, Judge Morris Arnold did not base his opinion below solely on the fact that Special Order 86-S-31 was authorized by the Chief of Police, rather than by Respondent Board.

Judge Morris Arnold gave equal weight to the fact that, on its face, Special Order 86-S-31 has no application whatsoever to the state statutes Plaintiff claims Respondent Board failed to enforce. Rather, Special Order 86-S-31 expressly and solely applies to a City of St. Louis ordinance, Section 3.44.110 of the Revised Code, which directs police officers with respect to enforcement of the City's anti-discrimination ordinances. Inasmuch as a primarily civil remedy is provided by that ordinance for discrimination violations, Special Order 86-S-31 directs officers not to arrest violators. Instead, it requires officers to refer the alleged "victims" to the City's Civil Rights Enforcement Agency, where an EEOC-like investigation, conciliation and hearing process can take place.

Although, because of the rarity of public accommodations complaints, the individual police officer defendants may have turned to Section 86-S-31 as the closest applicable directive for the situation, these individual actions cannot be tortured, as Petitioner would have it, into a full-fledged policy of not enforc-

ing complaints of public accommodations violations. A search of police department records over a five-year period found the incident involving Petitioner to be the only such complaint of a public accommodations violation. (See Appendix.)

In summary, what Petitioner attempts to portray as a mistake of law with respect to the question of who is a policymaker is, in actuality, a determination grounded in facts which are specific to the City of St. Louis and its police department. Under these circumstances, a ruling by this honorable court would have virtually no general applicability and could, in fact, result in additional confusion in the area of municipal policymaking.

Additionally, Respondent Board expressly objects to Petitioner's raising the issue of whether the Chief of Police is a "policymaker" when this issue was not put forward by Petitioner in proceedings below.

III

RESPONDENT BOARD HAS NO POLICY OF REFUSING TO ENFORCE STATE LAWS AGAINST PEOPLE WITH DISABILITIES, BUT, EVEN IF THAT WERE THE CASE, PETITIONER HAS NO STANDING TO BRING AN ACTION FOR ENFORCEMENT OF A SPECIFIC STATE CRIMINAL LAW

Before the Court can even entertain the issues raised by Petitioner in her Question III and its subparts, the Court must first find that Special Order 86-S-31 is, in fact, a policy of Respondent Board and, if so, that it applies to Section 209.150, RSMo., as Petitioner maintains. Neither of the courts below have so found, for the reasons discussed in their respective opinions which are set out in Petitioner's Petition for Writ of Certiorari, as well as for the reasons discussed previously herein.

Frankly, Respondent Board is taken aback to see itself characterized in Petitioner's Brief as being anti-disability (particu-

larly as portrayed in Petitioner's tasteless, useless and eminently humorless hypothetical about the "new KKK"), or, at the very least, the guardians of a policy designed and maintained to discriminate against disabled individuals.

Neither characterization, as Petitioner well knows and subsequently allows, is even close to the truth. Special Order 86-S-31 is not, and was never intended to be, a policy statement of Respondent Board's position with regard to persons with disabilities. As the plain language of the Order indicates, it is only a procedural directive telling police officers how to proceed in cases of violations of the city ordinance which prohibits discrimination in places of public accommodation, i.e., Section 3.44.110 of the Revised Code. Since the ordinance carries no express criminal penalty and requires resolution through a civil administrative procedure, Special Order 86-S-31 advises officers not to arrest, but to refer victims of discrimination to the appropriate city agency — all precisely in accordance with the terms of the ordinance.

It requires a certain suspension of logic on Petitioner's part to, first, see this Order as applying to specific state laws such as Sections 209.150, 209.160, and 213.065, R.S.Mo., and, from there, to further interpret the Order as denying enforcement of all state anti-discrimination laws which apply to disabled persons. The most that Petitioner can state with accuracy is that Respondent Board has no procedural order which expressly deals with enforcement of Sections 209.150, 209.160, and 213.065, RSMo. — just as it has no procedural orders which expressly deal with enforcement of the majority of other criminal laws enacted by the State of Missouri. In the absence of a specific directive to the contrary, the logical assumption is that police officers are to enforce Sections 209.150, 209.160, and 213.065, RSMo. in the same manner they would enforce any other criminal law of the State.

Petitioner's characterization of Special Order 86-S-31 as a deliberate policy of Respondent Board to discriminate against disabled persons has so little basis in fact (including the plain words of the Order) that it amounts to no more than a "straw man". Having hypothesized this invidious policy out of thin air, Petitioner then sets out to demonstrate its legal shortcomings.

Respondent Board cannot adequately respond to these arguments under the circumstances. If, indeed, Respondent Board had a policy such as that posited by Petitioner, e.g., one which only prohibited enforcement of laws which protect people with disabilities and which denied such people meaningful access to public accommodations, then Respondent would have to concede the correctness of Petitioner's argument. To argue to the contrary would be ridiculous.

But it requires a tremendous leap of fancy to interpret a simple procedural directive not to arrest for claimed violations of a specific city ordinance as, first, a policy of complete non-enforcement of state laws protecting the disabled, and, second, a policy of active discrimination against individuals with disabilities.

Petitioner's problem, of course, is that Respondent Board has no such policy; hence Petitioner's need to manufacture one.

As stated previously, Special Order 86-S-31 is no more, and no less, than a procedural directive applicable to a very specific city ordinance. It was never intended to be, and cannot be interpreted as, a general policy statement with respect to disabled individuals. Because the applicability of Special Order 86-S-31 is, by its terms, limited to Section 3.44.110 of the Revised Code of the City of St. Louis, this would not appear to be an issue of such widespread applicability as to warrant the issuance of a writ of certiorari.

In any event, Respondent Board would ask the Court to note that, regardless of how Petitioner attempts to disguise it, the gravamen of her complaint is that Respondent Board's police officers failed to enforce a state criminal law to her satisfaction.

The "public duty rule", which is well-settled in Missouri and has counterparts in most, if not all, other states, is clear that a municipality (in this case, Respondent Board) has no duty to a particular individual, as contrasted with its duty to the general public. Moreover, the general rule is that, since enforcement of the law is a duty which a municipality and its employees owe to the general public, a breach of that duty is not actionable by a private citizen. *Sherrill v. Wilson*, 653 S.W.2d 661, 669 (Mo. banc 1983); *Jamierson v. Dale*, 670 S.W.2d 195 (Mo.App. 1984); *Boyle v. City of Liberty, MO.*, W.D.Mo., 833 F.Supp. 1436, 1441 (1993); *Clay v. Scott*, Mo.App. E.D., 883 S.W.2d 573, 576 (1994); *Cooper v. Planthold*, Mo.App. E.D., 857 S.W.2d 477, 479 (1993); *Jackson v. City of Wentzville*, Mo.App. E.D., 844 S.W.2d 585, 588 (1993); *Beaver v. Gosney*, Mo.App., 825 S.W.2d 870, 872 (1992).

In fact, the holding of this Court in *DeShaney v. Winnebago*, 489 U.S.189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), is to the same effect, albeit under a different factual situation.

IV

CONCLUSION

For the reasons given above, and for those given by Respondents Cecil Whittaker's, Inc., et al. in its brief in opposition, Petitioner's Petition for Writ of Certioari should be denied.

Respectfully,

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APPENDIX

APPENDIX

METROPOLITAN POLICE DEPARTMENT
CITY OF ST. LOUIS
OFFICE OF THE CHIEF OF POLICE
SPECIAL ORDER

Date Issued: July 25, 1986
Order No. 86-S-31
Effective Date: July 30, 1986
Expiration: Indefinite
Reference: Chapter 3.44 of Revised Code of St. Louis
Canceled Publications: 79-S-12
Subject: PUBLIC ACCOMMODATIONS VIOLATION PROCEDURES
Document NO. E0062226

TO: ALL BUREAUS, DISTRICTS AND DIVISIONS

A. Chapter 3.44 of the Revised Code of the City of St. Louis prohibits discriminatory practices in places of public accommodations. The phrase "places of public accommodations" means all places or businesses offering or holding out to the general public, services or facilities for the comfort, health, and safety of such general public including, but not limited to, public places providing food, shelter, recreation and amusement. The purpose of this ordinance is "to insure that there is no discriminatory practices in places of public accommodations on account of race, color, religious beliefs, ancestry, or national origin." The provisions of the ordinance are such that, "Places serving the public shall not deny service, privileges or equal accommodation advantages to any person on account of race, color, or religion; nor post or circulate discriminatory information or advertisement."

B. Members of this Department shall not take any enforcement action to force compliance with this law, nor shall any

member of this Department deter any citizen from proceeding under the conditions of the ordinance on his own initiative. The following steps shall be taken by officers at the scene of a compliant arising under this ordinance:

1. Explain the requirements for filing a complaint with the Civil Right Enforcement Agency;

2. Ascertain the information necessary for the preparation of a Public Accommodations Report;

C. The preservation of order and maintenance of the peace is primary responsibility and in breach of peace cases, the established procedures for handling such disturbances shall be followed.

D. Department members shall inform persons involved in such an incident that the only action that can be taken is for the aggrieved person or persons to make, sign and file with the St. Louis Civil Rights Enforcement Agency, Room 300, Civil Courts Building, 622-3301, a complaint in writing under oath. This is the only course of action that can be followed. An officer must avoid taking any sides in disputes of this nature.

E. The Communication Division shall, upon receiving a telephone call from a complainant, dispatch two officers to the scene. When two one-man cars are assigned and on arrival at the scene only one man is needed, the assisting officer shall return to service. The dispatcher shall use the term "Public Accommodations Complaint" if the complainant gives the Radio Clerk sufficient information. However, as in all cases the dispatcher shall dispatch according to the classification that can be obtained from the complainant. Public Accommodations Complaints shall be coded as a 4232 for reporting purposes. A report will be prepared on all calls involving a public accommodations complaint.

F. In the event a police officer is dispatched, is directed by a citizen, or makes an on-view response to the scene he shall prepare a report including in the report the following:

1. Location of occurrence: Enter the address and other descriptive title of the place that the incident occurred;

2. Type of premises: Enter the type of business such as bar, restaurant, park, etc.;

3. Name of complainant: Residence address, residence phone and business phone;

4. Name of business owner: Enter the name of the owner of the business, residence address, business address, residence phone and business phone;

5. Name of person refusing service: Enter the name of the person who refused service to the complainant, residence address, residence phone and business phone;

6. Witnesses: Indicate the names, the residence addresses, the residence phone and the business phone numbers of witnesses to the incident.

G. In the narrative of the report enter the stated reason for the refusal of service exactly as the person who has refused the service relates the reason. It is very important that the precise reason be exactly enumerated in the report.

H. When a public accommodation report is prepared, a copy of the report shall be sent to the Civil Rights Enforcement Agency, Room 300, Civil Courts Building, which shall be indicated in the narrative of the report.

I. In the event that an officer responds to the scene of an incident arising from an attempt for service under this ordinance, an it should develop into a peace disturbance,

the officer shall handle is as a peace disturbance and prepare the Peace Disturbance Report. In the peace disturbance report the notation "Public Accommodations Incident" shall be included in the narrative of the offense report.

By Order of;
/s/ Robert E. Scheetz
Robert E. Scheetz
Colonel
Chief of Police -
Res/tf:kk

Rule 1
ADMINISTRATION AND COMMAND OF THE DEPARTMENT

RULES, REGULATIONS AND ORDERS OF THE BOARD

1.030 **Police Manual** - The rules and regulations for the government and discipline of Metropolitan Police Department , as adopted by the Board, shall be contained in the Police Manual.

1.031 **General Orders** -

a) The Board, at it's discretion, issue General Orders, which shall have the same force and effect as the rules and regulations of the Police Manual. General Orders, as soon as practical after publication, shall be printed for incorporation into this manual.

b) When such General Orders are completed and signed, the signed original is sent to Planning and Development Division, where it is retained after copies have been made and provided to the Chief of Police, the Deputy Chief, Bureau of Administration the Secretary to the Board of Police Commissioners. The Planning and Development Division then implements the Order by revising the affected page(s) of the Police Manual, identifying

the revised page(s) with the designation "Rev. 1","Rev. 2","Rev. 3", etc. beside the page number, and by printing and distributing the revised page(s). Each possessor of a Police Manual is responsible for substituting the revised page(s) for the existing page(s).

1.503 **Orders of the Department** - The Chief of Police may issue Special and Administrative orders, emergency orders, and such other orders, written or oral, as are not inconsistent with the law, these rules and regulations, and the orders of the Board.

STATE OF MISSOURI / CITY OF ST. LOUIS AFFIDAVIT

1. My name is Patricia Corkery, DSN 6952, and I have been employed by the St. Louis Metropolitan Police Department for the majority of my career since 1968.

2. I am presently a Senior Programmer/Analyst in the Information Services division.

3. I was given an assignment from the Legal Division to locate all police reports of incidents in which there was a complaint of an alleged violation of Section 209.150, Revised Statutes of Missouri, from 1991 through the present.

4. In response to this request, I identified the two charge codes which would be indicative of such a violation.

5. I searched the arrest file and the summons file for any incidents in which these charge codes were used, and found no such records.

6. Further, I searched the police reporting file for victims of public accommodations violations, and found C.N. 93-137559, the report which is the subject of this litigation.

7. I found no other record that would be responsive to this request.

The above information is true and accurate to the best of my knowledge, information, and belief.

/s/ Patricia Corkery
Patricia Corkery

Subscribed and sworn to before me this 6th day of September, 1996.

/s/ Ruth Ann Mc Daniel
Notary Public

Certificate of Service
Herewith are 40 copies of the Petition/Appendix
No._____

No. 98-1547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARILYN PONA,
Petitioner,

v.

CECIL WHITTAKER'S INC., et al.,
Respondents.

I hereby certify that I am this day _____ serving the foregoing documents (2) copies upon the person(s) and in the manner indicated below. Service first-class mail addressed as follows:

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St. Louis, MO 63101

Signed under the Pains and Penalty of Perjury,

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